IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.973 OF 2006

Nathkumar Balarama Dharadhar .. Appellant.
Vs.
Gajanan Narayan Warde & Ors. .. Respondents.

Mr.M.C.Shah with Mr.A.C.Mahimkar for the appellants.
Mr.Rajiv Patil for the respondents.

CORAM : D.B.BHOSALE, J.
DATED : 7TH FEBRUARY, 2007

P.C.:

. Heard learned counsel for the parties.

2. Admit. By consent of the parties the appeal is taken up for final hearing forthwith. Mr.Patil, learned counsel waives service for the respondents.

3. This appeal is directed against the judgment and order dated 28.4.2006 passed by the appeal court by which the appeal filed by the respondents - defendants was allowed. The operative part of the judgment reads thus:

> . "Appeal is partly allowed
> . Impugned decree dated 15.11.1999 is set aside.
> . The suit is remanded back to the trial Court which shall be registered it alongwith its original number and after giving opportunity to both the parties to amend the pleading or adduce additional evidence, if

> they so chose and in the light of the observations made earlier shall decide the suit according to law.
> . Both the parties to bear their own costs.
> . The trial of the suit be expedited.
> . Both the parties shall appear before learned lower Court on 5th June, 2006."

4. From perusal of the impugned judgment and in particular the observations made in paragraphs 5, 6 and 7 thereof it is clear that the measurement/survey of land in dispute was not carried out by the Cadastral Surveyor, whose report and map was placed on record and who was also examined as witness, in the manner in which he ought to have done. The measurement/survey was not carried out with reference to proper record. The appeal court, therefore, remanded the matter necessitating the parties to get the boundaries fixed afresh by Cadastral Surveyor. The appeal court has admittedly not entered into merits of the case and left everything open to the trial Court to consider and decide the suit afresh. The course adopted by the appeal court, in my opinion, was not proper. The learned Judge could have avoided the remand particularly in view of the fact that none of the parties made such prayer or sought liberty to either amend the pleadings or lead additional evidence. The learned counsel for the parties have fairly stated that I need not record reasons for setting aside the impugned judgment and they have

agreed for the following order:

(i) The impugned judgment and order is set aside.

(ii) The appeal court shall appoint a Cadastral Surveyor as Court Commissioner for fresh measurement/survey of the land in dispute with specific directions to submit his report within eight weeks from the date of his appointment. The appeal court may, in its order, issue necessary instructions/directions to the Court Commissioner, to be followed/observed, while carrying out the survey and fixing the boundaries of the lands of the parties.

(iii) The Cadastral Surveyor, who would be appointed by the appeal court, shall follow the proper procedure. He shall give sufficient notice to both the parties so as to enable them to remain present at the time of survey. The Cadastral Surveyor shall refer to the original record for fixing the boundaries of the lands of the parties to the suit. It is needless to express that the maps which are already produced on record may also be referred to by the Cadastral Surveyor while preparing his report.

(iv) The appeal Court shall pass appropriate order appointing the Cadastral Surveyor within four weeks

from the date of receipt of this order. The appeal court shall proceed to decide the appeal on merits in accordance with law within three months from the date of receipt of the report of the Cadastral Surveyor that would be submitted in pursuance of this order.

(v) The parties are directed to maintain status quo till disposal of the appeal by the first appeal court.

. With these observations the appeal stands disposed of.

(D.B.Bhosale, J.)